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No. 82-1581

In the Supreme Court of the United States

October Term, 1982

NANETTE E. QUENNEVILLE, Executrix of the Estate of Charles F. Quenneville,
Petitioner,

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, AND VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF CONTRA CERTIORARI

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REASONS FOR DENYING THE WRIT

The Respondent, Mt. Sinai Hospital of Cleveland, incorporates by reference the Brief Contra Certiorari as filed by Respondent, Delmark Company, Inc. The argument and citations contained therein will not be superfluously restated.

Rule 17 of the Revised Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. It provides as follows:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

While the above-cited is not controlling, the Petitioner has not raised a conflicting Federal Court of Appeals decision or a Federal question conflicting with a state court of last resort or an unsettled question for the Supreme Court's consideration. The Petitioner has also failed to identify a substantial Constitutional issue.

The questions presented by the Petitioner are limited to the Trial Court's discretion to prevent discovery of otherwise privileged information. A review of the record, as alluded to by the Court of Appeals, reveals that one of the Petitioner's expert witnesses, Dr. Harold Sours, had access to the information sought.

ARGUMENT

REQUEST FOR DISCOVERY OF OTHERWISE PRIVILEGED INFORMATION IS GOVERNED BY THE DISCRETION OF THE TRIAL COURT AND IN THE ABSENCE OF ESTABLISHING RELEVANCY AND/OR PREJUDICE SHALL BE PROHIBITED FROM DISCLOSURE.

The Petitioner asked the Trial Court to breach the privilege of confidentiality which is traditionally a basic premise of a physician-patient relationship. The Federal District Court for the Northern District of Ohio has addressed the issue in the case of *Hammond v. Aetna* (1965), 237 F. Supp. 96 and 243 F. Supp. 793 by indicating that the physician-patient privilege reaches to restrain those that seek to induce others to reach such confidentiality.

Williams v. Thomas Jefferson University, et al. (U.S.D.C., E.D. Pa. 1972), 343 F. Supp. 1131 is a case involving almost identical questions. It also was a mal-

practice action against a hospital where the plaintiff-patient sought discovery via interrogatories of the identity of other patients who had undergone treatment similar to plaintiff. In forbidding the discovery, the Court in its opinion said:

> "This is a malpractice case against a hospital and a doctor. Plaintiff has filed interrogatories seeking information from the hospital about women upon whom therapeutic abortions were performed in 1969 so that certain inquiries can be directed to them. In this way, plaintiff hopes to obtain evidence from former patients of the doctor so that his credibility can be impeached. The hospital objects to furnishing the information on the grounds that it is privileged.
>
> "I agree that the questions need not be answered. In the abstract, abortion is discussed openly and with fervor. Nevertheless, it is an extremely personal thing to each woman who has had an abortion. The consequences of allowing revelation and examination when considered in terms of family relationships and individual friendships could be disastrous to the subjects of an inquiry of the type plaintiff wants to make. A collateral attack for impeachment purposes does not weigh very heavily in a balancing of interests when opposed to such obvious reasons for privacy." (p. 1132)

In *Berman et al. v. Duggan et al.* (C.P. Allegheny County, Civil Division 1971), 119 Pitt. Legal J. 226, the patient's right to privacy was even protected against a search of hospital records for evidence relevant to a criminal prosecution of three physicians on the charge of conspiracy to commit illegal abortions at a designated hospital on a specific date. A subpoena had been issued, at the request of the District Attorney, directing the hospital involved to produce the medical records of all patients

who had undergone therapeutic abortions at the hospital during the preceding year and other pertinent information given by these patients to the hospital and their physicians. Three former patients of the hospital who had obtained therapeutic abortions, thereupon instituted a class action on behalf of themselves and all other women whose medical records were to be produced, seeking an injunction prohibiting the hospital from disclosing any personal information about them pursuant to the District Attorney's subpoena. In support of their claimed right to object to the production of their records, plaintiffs relied upon the physician-patient privilege.

In holding that the hospital records constituted privileged communications immune from discovery which rendered the subpoena issued for their production void, the Court said:

> "* * * Although the hospital records might be of some aid in the investigation of the criminal charges filed against the three physicians, this court recognizes a paramount public interest in maintaining the confidential relationship between physician and patient. The detrimental effect upon a physician's ability to tend to his patient in a responsible professional capacity is much too great a price to pay for any possible benefit to be derived from sifting through voluminous records of personal data in search of evidence." (p. 236)

The Petitioner reasons that her Writ for Certiorari should be granted because the Trial Court departed from the usual and accepted course of judicial proceedings denying her a fair trial. Quite the contrary is the fact. The above-cited contradicts the contention that the court departed from accepted courses of judicial proceeding. As to a fair trial, not only did the Petitioner's experts, two

of whom were previously with the Center for Disease Control, testify with full knowledge of the information sought, but over objection of the Respondents, the Court permitted rebuttal expert testimony.

The Petitioner argues that since she only sought names and addresses of other persons participating on the Optifast Diet Program, it is not a breach of confidential medical diagnosis and/or treatment. If so, what value and relevancy are mere names? Each and every patient identified would presumably be required to reveal their medical diagnosis and treatment which is the very reason for the time-honored confidentiality as preserved by the physician-patient privilege.

CONCLUSION

The Petitioner has not raised a question worthy of this Honorable Court's treasured time and consideration.

The Trial Court and Court of Appeals have given the Petitioner every opportunity to be heard on the subject, and there is no basis to the contention that there has been an abuse of discretion to the Petitioner's prejudice.

Respectfully submitted,

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